IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| CAROLYN COLEMAN and JESSE J. COLEMAN, wife and husband,<br><br>Plaintiffs/Appellants,<br><br>v.<br><br>DAVID SLOAN, individually; ALLIANCE IMAGING, INC., a Delaware corporation; and SIERRA VISTA MEDICAL CENTER, an Arizona joint venture partnership,<br><br>Defendants/Appellees. | 2 CA-CV 2006-0174<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200400417

Honorable Stephen M. Desens, Judge

APPEAL DISMISSED

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The Kerley Firm, P.C.
By James K. Kerley — Sierra Vista
Attorney for Plaintiffs/Appellants

Humphrey & Petersen, P.C.
By Andrew J. Petersen — Tucson

and

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Sierra Vista Medical Center

B R A M M E R, Judge.

**¶1** Appellants Carolyn and Jesse Coleman appeal from the trial court's order setting aside the default judgment against appellee Sierra Vista Medical Center ("SVMC"). The Colemans argue the trial court abused its discretion in finding SVMC's conduct constituted excusable neglect, and SVMC's insurer had no right to seek to set aside the default judgment. The Colemans also assert the court erred in treating a letter sent by a nonparty as a responsive pleading or an attempt to give notice and in granting SVMC's motion to vacate the default judgment on the ground of fraud or misrepresentation. However, SVMC contends we do not have jurisdiction to consider the appeal. We agree with SVMC and, therefore, dismiss the appeal.

**Factual and Procedural Background**

**¶2** The facts are essentially uncontested and are as follows. The Colemans sued SVMC, Alliance Imaging, Inc. ("AI"), and David Sloan on June 30, 2004. The complaint alleged that Carolyn Coleman went to Sierra Valley Diagnostics on August 28, 2002, to have a magnetic resonance imaging ("MRI") examination of her back. Sierra Valley Diagnostics contracted with AI to perform its MRI examinations. Because Coleman suffered from claustrophobia, she needed to be medicated in order to have the MRI. After the medication had taken effect, Sloan, an employee of AI, took Coleman in a wheelchair outside to the mobile MRI unit behind the building. The complaint stated Coleman was unrestrained in the

wheelchair, and after Sloan moved her too quickly on the path and struck a hole in the cement, she fell to the ground, which resulted in various injuries that required surgery. SVMC owned the premises where the accident occurred.

**¶3** Kenneth Kacenga is a doctor employed by the Cochise Health Alliance Medical Group ("CHAMG") and is a partner in SVMC. CHAMG is the entity that manages SVMC. Kacenga was served on behalf of SVMC with a summons and complaint in the lawsuit on Friday, July 2, 2004. The summons stated Kacenga had twenty days "to appear and defend" the action, and if he failed to do so, a default judgment would be entered against him. Sloan and AI were also served, and they answered the complaint on July 30.

**¶4** Kacenga had thirty-six appointments on July 2 and was covering for his partner, who had been on vacation for approximately two weeks. Kacenga was scheduled to go on vacation the following week. He reviewed the paperwork, thought he was "one of many who were served," and did not recall the patient or incident. His name was not listed in the complaint. He had been served previously with legal papers and had not been required to do anything with them, so he returned to his work, thinking that someone else would address the complaint. He assumed the complaint would also be served on Eileen Brien, the chief executive officer of CHAMG and property manager for SVMC, who "handled all litigation[]."

**¶5** On August 3, Kacenga received a copy of the application for default. He immediately gave it to his office manager to give to Brien. Brien, who is not an attorney, had

not yet been given a copy of the Colemans' complaint. When she received the application for default from Kacenga, she immediately attempted to contact the Colemans' lawyer, James Kerley. She called Kerley's office six times between August 6 and August 18 and was told he was out of the office. Each time she called, she left a message asking him to call her back, but he never returned her calls. On August 18, she sent him a letter stating she was the managing agent for the partnership, had called him six times, and asked for information about the complaint. She also stated in the letter that she had unsuccessfully attempted to contact the attorney for Sloan and AI. Brien also sent a copy of that letter to the Cochise County Superior Court Clerk, attempting to "put a hold on whatever was occurring with the lawsuit until [she] could get more information."

**¶6** On August 30, 2004, the trial court entered a default judgment against SVMC and awarded the Colemans $900,000. The judgment contained no language pursuant to Rule 54(b), Ariz. R. Civ. P., 16 A.R.S., Pt. 2. On September 20, SVMC moved to stay execution of the judgment and moved on October 1 to set aside the default judgment.

**¶7** After a hearing, the trial court set aside the default judgment on May 15, 2006, nearly two years after the entry of default. The court found that Kacenga's and Brien's conduct constituted excusable neglect under Rule 60(c)(1), Ariz. R. Civ. P., 16 A.R.S., Pt. 2. Alternatively, the court also stated that Brien's letter "is in the nature of a responsive pleading even though the same is technically deficient to constitute an answer" and was, "[a]t a minimum," "a clear attempt to give notice to Plaintiffs' counsel and the Clerk of the Court

that [SVMC] was attempting to respond to the litigation." As a third reason to set aside the default judgment, the court stated, "Relief is justified under Rule 60(c)(3) in that the amount of the default judgment may be excessive in light of [Coleman's] extensive medical records and health complications and disputed issues related to liability and damages." This order also did not contain Rule 54(b) language.

**¶8** On July 13, the Colemans asked the trial court to reconsider its May 15 ruling. One week later, the Colemans requested the court to "enter an order directing the entry of final judgment with an express determination that there is no just reason for delay and an express direction for the entry of judgment." However, the Colemans did not specify to which of the court's rulings they sought to have the Rule 54(b) language added. On July 25, the court denied the motion for reconsideration and stated in its minute entry "that as to this decision of the Court it is directed that final judgment be entered and that there is no just reason for delay in this matter."

**¶9** The next day, SVMC responded to the Colemans' request for the addition of Rule 54(b) language, noting that "[t]he order of this Court [setting aside the default judgment] is not an appealable order" because the Colemans had failed to have Rule 54(b) language included "in the original default judgment." In a July 31 hearing, for which we have been provided no transcript, the court ruled on other issues not relevant here and also granted the Colemans leave "to prepare and file with the Court appropriate pleadings to seek Rule 54(b) language in the underlying Default Judgment." Instead, the Colemans filed a

reply to SVMC's response to their request for Rule 54(b) language and stated, "The Court has now added Rule 54(b) language and entered final judgment. Plaintiffs accept that the Court has effectively rule[d] on the Motion for Rule 54(b) Language." The Colemans then filed their notice of appeal on August 3, stating they were appealing from the May 15 order setting aside the default judgment and the "Final Judgment" of July 25.

**Discussion**

**¶10** SVMC asserts that we do not have jurisdiction to consider the appeal. Ordinarily, "an order setting aside a default judgment is appealable as a special order made after judgment." *Sanders v. Cobble*, 154 Ariz. 474, 475, 744 P.2d 1, 2 (1987); *Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, ¶ 5, 90 P.3d 1236, 1238 (App. 2004) (same); *see also* A.R.S. § 12-2101(C) (appeal may be taken "[f]rom any special order made after final judgment"). However, we conclude the default judgment is not a final judgment. Rule 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

*See also Sullivan & Brugnatelli Adver. Co. v. Century Capital Corp.*, 153 Ariz. 78, 80, 734 P.2d 1034, 1036 (App. 1986) ("Rule 54(b) applies to default judgments.").

**¶11** Division One of this court was faced in *Sullivan* with a situation nearly identical to ours. In that case, the court stated, "When there are multiple defendants, . . . a default judgment against one defendant is not a final judgment in the absence of an express determination that there is no just reason for delay and an express direction for entry of judgment, as required by Rule 54(b)." 153 Ariz. at 80, 734 P.2d at 1036. Similarly, in both *Sullivan* and the present case, "[t]he trial court . . . did not make the express finding required by Rule 54(b). The default judgment against only one defendant therefore is not a final judgment." 153 Ariz. at 80, 734 P.2d at 1036. Interestingly, the parties here agree that *Sullivan* "is directly on point."

**¶12** We note that the trial court here did add language similar to that required by Rule 54(b) to the unsigned minute entry denying the Colemans' motion for reconsideration. But that language was entered "as to this decision" and added nothing to the default judgment to make it final. In a later minute entry, the trial court granted leave to the Colemans "to prepare and file with the Court appropriate pleadings to seek Rule 54(b) language in the underlying Default Judgment." Instead of availing themselves of this opportunity, however, the Colemans filed a reply, followed by their notice of appeal.

Because the underlying default judgment contains none of the provisions required by Rule 54(b), we therefore lack jurisdiction of the appeal and, accordingly, dismiss it.[1]

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge

[1]We also note that the Colemans failed to timely appeal from the order setting aside the default judgment. *See* Ariz. R. Civ. App. P. 9, 17B A.R.S. (notice of appeal must be filed no later than thirty days after entry of judgment). Their motion for reconsideration was not a time-extending motion under Rule 9. *See id.* (listing four motions that extend the time for appeal). Instead, the Colemans' appeal would only be timely as to the trial court's denial of their motion for reconsideration, which was part of an unsigned minute entry on July 25. We need not decide if this unsigned minute entry denying a motion for reconsideration would be appealable because of our conclusion that the default judgment is not a final judgment in the absence of Rule 54(b) language.